340

SUPREME COURT OF THE UNITED STATES.

No. 194.

CHARLES FLOWERS, SURVIVOR OF ALICE FLOWERS, PL'FFS IN ER.,

vs.

FRANCIS FOREMAN, SURVIVING PARTNER OF CHRISTIAN KELLER.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE DISTRICT OF MARYLAND.

INDEX.

	Original.	Print.
Summons	1	1
Marshal's return	2	2
Declaration	3	2
Agreement	9	6
Plea and issue	10	6
Jury	11	7
Verdict and judgment	11	7
Plaintiffs' exception	12	7
Louisiana record	12	8
Petition	12	8
Deed of sale	15	9
Citation	18	11
Service	18	11
Extract from the minutes	18	12
Answer of Carnal	19	12
Deed	19	12
Extract from the minutes	22	14
Answer of Mulhollan	22	14
Power of attorney annexed to the answer	24	15
Deed annexed to the answer	26	17
Release of mortgage	28	18
Citation to warrantors	29	18
Service	29	19
Answer of Keller and Foreman	29	19
Extracts from the minutes	31	19
Answer of Davis' heirs	31	20
Citation to A. Calvit	32	20
Service	33	21
Answer of Calvit	33	21

Extracts from the minutes	33	21
Extracts from the minutes	34	22
Amended petition	35	22
Answer of Mulhollan to amended petition	35	23
Extract from the minutes	36	23
Judgment	36	23
Appeal bond	37	24
Extract from the minutes	37	24
Judgment of the Supreme Court	38	24
Rehearing	48	30
Extracts from the minutes	55	34
Extract from the minutes	56	35
Answer of Mulhollan's heirs	56	35
Extract from the minutes	56	35
Judgment	57	35
Commission to Louisiana	59	37
Plaintiffs' interrogatories	61	38
Agreement	63	39
Cross-interrogatories	63	39
Evidence of James A. Calvit	64	40
Cross-examination	66	41
Evidence of Octavus N. Ogden	67	42
Cross-examination	70	43
Exhibit "A"—will of C. Mulhollan	71	44
Court's instruction	76	47
Writ of error	77	47
Citation	80	48
Writ of error—bond	81	49
Clerk's certificate	82	50

THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

At a circuit court of the United States for the fourth circuit in and for the Maryland district, begun and held at the city of Baltimore, on the first Monday in November, in the year of our Lord one thousand eight hundred and fifty-six.

Present, the honorable William F. Giles, judge of Maryland district, William M. Addison, esquire, attorney, John W. Watkins, esquire, marshal, Thomas Spicer, clerk.

Among other were the following proceedings, to wit:

CHARLES FLOWERS, survivor of ALICE FLOWERS,
vs.
FRANCIS FOREMAN, surv'g partner of CHRISTIAN KELLER.

Be it remembered, that heretofore, to wit, on the third day of November, in the year of our Lord one thousand eight hundred and fifty-five, the said Charles Flowers and Alice Flowers, by Robert J. Brent, their attorney, prosecuted and sued forth out of the circuit court here, the writ of the United States of America of subpœna against the said Francis Foreman, directed to the marshal of the Maryland district, in the words and of the tenor following, to wit:

Summons.

THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

[SEAL.] To the marshal for the Maryland district, greeting:

We command you, that you summon Francis Foreman, a citizen of the State of Maryland, surviving partner of Christian Keller, that all excuses and delays set aside, he be and appear before the circuit court of the United States for the fourth circuit in and for the Maryland district, to be held at the city of Baltimore, on the first Monday in November instant, to answer unto Charles Flowers and Alice Flowers, citizens of the State of Louisiana, heirs and universal legatees of Charles Mullholland, of a plea of trespass on the case, &c.; hereof, you are not to fail at your peril, and have you then and there this writ.

Witness the honorable R. B. Taney, Chief Justice of our

Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and fifty-four.

R. J. B. Issued 3d November, 1855.

THO. SPICER,
C'k Cir't C't.

At which mentioned first Monday in November, in the year of our Lord one thousand eight hundred and fifty-five, being the day of the return of the aforegoing writ, comes into the circuit court here the said Charles Flowers and Alice Flowers, by their attorney aforesaid, and the marshal of the Maryland district aforesaid, to wit, John W. Watkins, gentleman to whom the said aforegoing writ was in form aforesaid directed, makes return thereof to the court here thus indorsed, to wit:

Marshal's return.

"Mr. Watkins, return this writ summoned."

BROWN & BRUNE,
For Defend'ts.

"J. W. WATKINS,
U. S. Marshal."

And the said Francis Foreman being called, appears in court here by Brown & Brune, his attorneys. Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is continued until the first Monday in April next.

At which said first Monday in April, in the year of our Lord one thousand eight hundred and fifty-six, come again into the circuit court here the parties aforesaid, by their attorneys aforesaid.

And the aforesaid Charles Flowers and Alice Flowers, by their attorney aforesaid, declared against the said Francis Foreman in the plea aforesaid, in form following, to wit:

Declaration.

Circuit court of the United States for the Maryland district.

CHARLES FLOWERS &
ALICE FLOWERS
vs.
FRANCIS FOREMAN.

UNITED STATES OF AMERICA,
Maryland District, sct.

Francis Foreman, survivor of Christian Keller, a citizen of Maryland, was summoned to answer unto Charles Flowers and

Alice Flowers, heirs and universal legatees of Charles Mulhollan, citizens of Louisiana, in a plea of trespass on the case, &c. And whereupon, the said Charles Flowers and Alice Flowers, by Robert J. Brent, their attorney, complain, that whereas, heretofore, to wit, on the twenty-first day of December, in the year one thousand eight hundred and twenty-seven, to wit, at the State of Maryland aforesaid, the said Francis Foreman and the said Christian Keller, being then and there merchants and co-partners, trading then under the firm of Keller and Foreman, by a certain instrument of writing or power of attorney by them duly signed and acknowledged, and bearing date the day and year aforesaid, did make, constitute, and appoint a certain William Armstrong, esquire, of Alexandria, in the State of Louisiana, their true and lawful attorney for them, and in their names to make sale and dispose of, to any person or persons, a certain tract or parcel of land, of which they, the said Keller and Foreman, claimed to be the owners, situate, lying and being in the parish of Rapides, in the said State of Louisiana, on the bayou Boeuf, and having a front on each side of said bayou of six arpents, and running back so as to contain the quantity of three hundred and fifty arpents, more or less, adjoining lands of the estate of Challan above, and James Brewster below, being the same which the said Keller and Foreman alleged to be acquired by them by purchase of A. J. Davis, of the parish of Rapides, by the deed of record in the office of the parish, judge of the parish of Rapides, together with all the right, privileges, and appurtenances thereto belonging; and by the said power of attorney, did further authorize and empower the said William Armstrong, thereby appointed their attorney aforesaid, to receive and give receipts for the consideration money which the said land might sell for, and on payment thereof, to make, sign, seal, acknowledge, and deliver to the purchasers thereof, a deed of assignment and transfer thereof, in due form of law, with power also an attorney or attorneys under him for that purpose to make and substitute, and to do all lawful acts requisite for effecting the premises, to wit, to do all lawful acts which might be requisite for the purpose of making sale or disposing of the tract of land aforesaid, or of receiving and giving receipts for the consideration money aforesaid, or of making, signing, sealing, acknowledging, and delivering the deed aforesaid, and also by the said power of attorney, did ratify and confirm all that their said attorney, to wit, the said William Armstrong, or his substitute or substitutes, should do in the said premises by virtue of the said power of attorney.

And whereas, afterwards, to wit, on the first day of April, in the year one thousand eight hundred and twenty-eight, at the parish of Rapides, and State of Louisiana aforesaid, the said Christian Keller and Francis Foreman, by the said William

Armstrong, acting as their lawful attorney, under and by virtue of the power of attorney aforesaid, by their certain deed or instrument of writing, duly signed, executed, acknowledged, and delivered, in accordance with the laws of Louisiana, by the said William Armstrong, as attorney in fact for the said Keller & Foreman, did bargain, sell, transfer, and deliver to a Charles Mulhollan (ancestor of the plaintiff's) the tract or parcel of land above described, for and in consideration of the sum of three thousand four hundred dollars, of which the sum of fifteen hundred dollars was paid by the said Charles Mulhollan to the said Keller & Foreman before the execution of the said deed, the receipt whereof was acknowledged by the said Keller and Foreman through the said William Armstrong, their attorney as aforesaid in the said deed, and the balance of nineteen hundred dollars, payable in two equal instalments, and secured by a mortgage upon the said tract; which mortgage was contained in the said deed, was also fully paid and satisfied by the said Charles Mulhollan to the said Keller and Foreman on or before the 18th day of February, 1831, the receipt whereof was acknowledged; and the said mortgage released by the said Keller and Foreman, through the said William Armstrong, their attorney as aforesaid, in and by an entry made upon the said deed, and duly attested according to the laws of Louisiana, bearing date the day and year last aforesaid, and also by the deed or instrument of writing aforesaid, the said Keller and Foreman, by the said William Armstrong, their attorney in fact as aforesaid, did covenant and agree to and with the said Charles Mulhollan that they would warrant and forever defend the above described premises, so as aforesaid conveyed by the said deed against the claim or claims of their heirs and those claiming by, from, or under them, and against the claim or claims of all persons whatsoever.

And the said plaintiffs in fact say, that at the execution and delivery of the aforementioned deed from the said Keller and Foreman to the said Charles Mulhollan, and long before a certain James Calvit and Coleman Calvit, late of the State of Louisiana, by the laws of the said State, were seized in their demesne as of fee of and in one undivided fourth part of the tract of land above described, and by the said deed from the said Keller and Foreman to the said Charles Mulhollan so as aforesaid attempted to be conveyed.

And the said plaintiffs further say, that by a decree or judgment of the supreme court of the said State of Louisiana, rendered in a cause wherein the said James and Coleman Calvit and others were plaintiffs, and the said Charles Mulhollen and another defendants, it was by the said supreme court adjudged, ordered, and decreed that the said James and Coleman Calvit should recover of the said Charles Mulhollan and another, de-

fendants, each and respectively, one undivided eighth of the said tract of land, and should be quieted in their title to the said undivided eighth, thereby decreed to them respectively, as against the said Mulhollan and his co-defendant, or any other person claiming through or under them; and also, it was considered by the same court that the said Charles Mulhollan and his co-defendant should pay one-half the costs in both courts, to wit, in the said supreme court, and also in the district court for the parish of Rapides, in which the said cause was originally brought, and from the judgment of which the said cause came up on appeal to the said supreme court.

And the said plaintiffs in fact further say, that the aforesaid James and Coleman Calvit, by virtue of their title and of the recovery aforesaid, by the judgment or decree aforesaid, entered into the one undivided fourth of said tract aforesaid, and was thereof possessed; and the said Charles Mulhollan, the ancestor of the plaintiffs, from the aforesaid one undivided fourth, totally expelled and removed, whereby the said plaintiffs say that their ancestor, the said Charles Mulhollan, out of and from one undivided fourth of the said tract of land so as aforesaid conveyed or attempted to be conveyed to him by the deed aforesaid from the said Keller and Foreman to the said Charles Mulhollan, was ousted and evicted, contrary *contrary* to the form and effect of the said deed, and of the said promise and agreement of the said Keller and Foreman, so by them made in that behalf as aforesaid; and also, that the said Keller and Foreman, during their joint lives, nor the said defendant since the death of his partner, the said Keller, the said undivided fourth part of the tract aforesaid against the claim or claims of all persons whatsoever has not warranted or defended; by reason of all which, the said plaintiffs have been obliged to expend a large sum of money in buying out the claims of the said James and Coleman Calvit, to wit, the sum of twenty-four hundred dollars, and have also been obliged to pay one-half the costs of said cause, both in the said supreme court of Louisiana and of the said district court for the parish of Rapides, which amount to a large sum of money, to wit, to the sum of one thousand dollars, and have been further compelled and obliged to sustain and undergo, and have actually sustained and undergone, the payment of divers large sums of money, amounting in the whole to a large sum, to wit, the sum of two thousand dollars, in and about endeavoring to defend the said cause in the courts aforesaid; of all which premises the said defendant afterwards, to wit, on, &c., at, &c., had notice, by means whereof he, the said defendant, then and there became liable to pay to the said plaintiffs the last mentioned sums of money, when he, the said defendant, should be thereunto afterwards requested; and being so liable, he, the said defendant, afterwards, to wit, on the day

and year aforesaid, at the district aforesaid, undertook, and then and there faithfully promised the said plaintiffs to pay them the said sums of money; nevertheless, the said Christian Keller in his life-time, and the said Francis Foreman since his death, have not, nor has either of them yet paid the aforesaid several sums of money or any part thereof to the said plaintiffs, although so to do they were often requested, but to pay the same the said defendant hath hitherto altogether refused, and still doth refuse so to do, to the damage of the said plaintiffs in the sum of ten thousand dollars, and therefore they bring suit.

R. J. BRENT,
Att'y for Pl'ffs.

Thereupon, the parties aforesaid, by their attorneys aforesaid, filed in the circuit court here an agreement, in the words and of the tenor following, to wit:

Agreement.

In the Circuit Court of the United States, April Term.

FLOWERS
v.
FOREMAN.

It is agreed that the defendant shall plead non assumpsit in the above case, and that under the issue to be formed upon such plea all errors in pleading are to be mutually waived, and the defendant is to be permitted under said plea to rely upon the statute of limitations, and any other fact or defence as if specially and properly pleaded.

R. J. BRENT,
For Pl'ff.
BROWN & BRUNE,
April 14, 1856. *For Defnd't.*

And the said Francis Foreman, by his attorneys, comes and defends the force and injury, when, &c., and saith that he did not assume upon himself in such manner and form as the said Charles Flowers and Alice Flowers above against him have complained, and of this he puts himself upon the country, and the said Charles Flowers and Alice Flowers in like manner, &c.

Therefore, let a jury thereon appear before the court here on the first Monday in November next, by whom, &c., and who neither, &c., to recognise, &c., because as *as* well, &c. The same day is given to the said parties then and there, &c.

And now at this day, to wit, the first Monday in November, in the year of our Lord one thousand eight hundred and fifty-six, comes again into the circuit court here the parties aforesaid, by their attorneys aforesaid.

And the said Charles Flowers, by his attorney aforesaid, suggests to the court here that the said Alice Flowers, one of the parties plaintiff with him, the said Charles Flowers, in this cause after the last continuance of the plea aforesaid, and before this time, that is to say, at the district aforesaid, departed this life, leaving him, the said Charles Flowers, her survivor, and whom he hath survived, and which the said Francis Foreman doth not deny, &c.

Whereupon, for trying the issue aforesaid, it is ordered by the court here, that twenty persons from the pannel of petit jurors returned to the court here by the marshal of the Maryland district aforesaid be drawn by ballot; and thereupon, the twenty persons being so drawn by ballot, and written upon two lists, one of which said lists is delivered to the counsel for the respective parties, and the counsel for each of the said parties, having stricken out four persons from the said lists, thereupon the remaining twelve persons being called, come, to wit: George C. Morton, James McHenry, James Steel, Joseph W. Shaw, William Owens, Richard C. Hardesty, Samuel Jackson, John W. Davis, Wm. P. Patterson, J. Carroll Walch, Wm. B. Howard, John Meyers, who, being empannelled and sworn to say the truth upon the premises, upon their oath do say, that the said Francis Foreman did not undertake and promise in manner and form as the said Charles Flowers within against him hath complained; therefore, it is considered by the court here that the said Charles Flowers take nothing by his writ and declaration aforesaid, but that he be in mercy for his false clamour, and that the said Francis Foreman go thereof without day, &c.

And it is also considered by the court here that the said Francis Foreman recover against the said Charles Flowers the sum of by the court here unto the said Francis Foreman, on his assent adjudged for his costs and charges by him about his defence in this behalf laid out and expended, and that he have thereof his execution against the said Charles Flowers, &c.

Memorandum.—Before the jurors aforesaid withdrew from the bar of the court here, the said Charles Flowers, by his attorney aforesaid, tendered to the court here the following bill of exceptions, which was by the court here signed and sealed, and which is in form following, to wit:

Plaintiff's exception.

CHARLES FLOWERS, survivor of ALICE FLOWERS, *v.* FOREMAN, survivor of KELLER. } Plaintiff's exception.

At the trial of this cause the plaintiff read in evidence the

record of the proceedings in the suit of Calvit and others *vs.* Mulholland and others, made a part hereof.

Record.

District Court, parish of Rapides, State of Louisiana.

"Wm. J. Calvit and others
v.
"Mulhollan & Carnal.

Petition.

To the honorable the judge of the sixth judicial district in and for the parish of Rapides, and State of Louisiana.

The petition of William J. Calvit, Elizabeth G. Calvit, wife of Alexander Compton, and duly authorized and assisted in this suit by her said husband, who joins her therein, James A. Calvit and Coleman W. Calvit, all of the parish of Rapides, with respect represents, that the said William, Elizabeth, James, and Coleman are the sole heirs of their mother, Mary Mayes, deceased, who was the lawful wife of their father, Anthony Calvit; that the said Anthony Calvit, during the community between him and the said Mary, his wife, purchased from a certain John Rippey a tract of land in the parish of Rapides, situate on the bayou Boeuf, containing six arpents front, with the depth of forty on the east side of said bayou, and six arpents in front on the west side of said bayou, with such depth as to make one hundred arpents superficial measure on the said west side of said bayou, and bounded by lands of James Brewster below, and above on the east side of said bayou by lands of the heirs of Nicholas Challan, dec'd, which will more particularly appear from the said deed of sale hereto annexed; that the mother of your petitioners died in the parish aforesaid, on the day of May, 1816, leaving the aforesaid William, Elizabeth, James, and Coleman his heirs as aforesaid, who were at that time minors of tender age, and that their father, the said Anthony Calvit, was their natural tutor, who remained so for a number of years thereafter, until they respectively arrived at the age of majority; that some time in the year 1822 the said Anthony, whilst your petitioners were minors and under his care and protection, sold the whole of the said tract of land to a certain A. G. Davis, of said parish, in violation of the just rights of your petitioners, who have title to one undivided half of said tract of land as the heirs of their mother as aforesaid; that the tract of land above described is now in the possession of Charles Mulhollan and Reubin Carnal, of said parish, who claim the same by virtue of said conveyance to Davis, and from him to

them by various mesne conveyances; that your petitioners are entitled to recover from the said Mulhollan and Carnal the said undivided half of said tract of land by reason of the *of the* premises aforesaid, and, moreover, the rents and profits of their portion of said land from the year 1822 up to the trial and decision of this suit, which your petitioners allege amount to the sum of $20,000 or more; that the said Mulhollan and Carnal and those under whom they claim have been possessors in bad faith; that at any rate, even if bad faith should not appear, that your petitioners have a right to have of them the said defendants the rents and profits aforesaid, from the institution of this suit, which they allege to be worth $5,000 per year.

Your petitioners therefore pray that the said Mulhollan and Carnal be cited to answer this petition, and for judgment against them for the said undivided half of said tract of land, and the profits aforesaid, and that your petitioners be forever quieted in the title and possession of said land, and for such other and further relief as justice and equity may require, &c.

DUNBAR & HYAMS.

Filed 23 April, 1838.

CHAS. WILSON, *D'y Clerk.*

Deed of sale annexed to the petition.

On the thirteenth day of January, in the year of our Lord one thousand eight hundred and sixteen, before William P. Cannon, judge of the parish of Rapides, exercising powers and performing the duties of notary public in and for the said parish, personally appeared Doctor John Rippy and Anthony Calvit, both of said parish, and the said John Rippy acknowledge, that for and in consideration of the sum of twenty-five hundred dollars to be paid to him, the said John Rippy, by the said Anthony Calvit, in manner and form as hereafter mentioned, the said John Rippy grants, bargains, sells, transfers, convey, and delivers the possessions to the said Anthony Calvit, his heirs and assigns, all and singular, a certain tract or parcel of land situate, lying, and being on the bayou Beouf, in the parish of Rapides aforesaid, and whereon, the said Anthony Calvit lives and resides, being the same land which the said John Rippy purchased of and from Francis Bradly, deceased, as will appear by the deed of conveyance from the Bradly to the said Rippy, of record in the office of the parish judge of the said parish of Rapides, being on both sides of the said bayou Beouf, adjoining lands of James Brewster, esqr., below, and above on the east side of the said bayou by lands of the heirs of Nicholas Challen, deceased, containing six arpents in front, with the depth of forty arpents on the east side of the said bayou Boeuf, and six arpents in front on the west side of the said bayou, and so far back or deep as to make one hundred arpents superficial measure, more

or less, on the said west side of the said bayou, together with all and singular the improvements, and right, title, interest, claim, and demand of the said John Rippy, which he derived of and from the said Francis Bradly, of, in, and to the said land; and the said John Rippy doth hereby warrantee to other title of grants, quality, or title to the said described land and premises to the said Anthony Calvit, his heirs or assigns, did such as the said Rippy derived or obtained of and from the said Bradly, the above cited deed of conveyance of and to the said land. And the said Anthony Calvit doth by these presents acknowledge to owe and be indebted to the said John Rippy, his heirs and assigns, in the said sum of twenty-five hundred dollars, to be paid in the following manner as the consideration money or price of said land, to wit: the sum of eight hundred and thirty-three dollars and thirty-three and one-third cents, to be paid on the first day of March, in the year one thousand eight hundred and seventeen, eight hundred and thirty-three dollars and thirty-three and one-third cents, on the first day of March, in the year one thousand eight hundred and eighteen, and the further sum of eight hundred and thirty-three dollars and thirty-three and one cents on the first day of March, in the year one thousand eight hundred and nineteen, making in the whole the said sum of twenty-five hundred dollars; and in order to secure the payment of the said sum of twenty-five hundred dollars, the said Anthony Calvit hath, the day of the date of these presents, given to the said John Rippy his three several notes, in equal date with these presents, to be paid in three different instalments as above stated, with Alexander Fulton his security; and the said Calvit doth by these presents mortgage, hypothecate, and set over the said land and its appurtenances, and every part and parcel thereof, to the said John Rippy, his heirs and assigns, and doth in the presence of said judge and the subscribing acknowledgers, that the said mortgage shall have the effect of a judgment confessed for the above sum of twenty-five hundred dollars as above stated and stipulated, and shall operate as a special mortgage on the *the* said land until the final payment of the said sum of twenty-five hundred dollars; and the said Anthony Calvit being here present accepts of the above conveyance, all and singular its acts and clauses.

In witness whereof, the said John Rippy and the said Anthony Calvit, in the presence of the said judge and the subscribing witnesses, have hereunto set their hands the day and year first above written.

Passed and acknowledged before me,

W. P. CANNON,
Parish Judge of Rapide.
J. RIPPEY,
A. F. CALVIT.

Witnesses:
BENJN. F. KITCHEN,
WM. C. HARRISON.

I certify the foregoing to be a true copy of the original on file and of record in my office.

Given under my hand and seal of office as parish judge in and for the parish of Rapides, this 21 day of April, A. D. 1838.

[SEAL.] JOHN H. JOHNSON,
Par. Judge.

Citation.

State of Louisiana, 6 district court, parish of Rapides.

WM. J. CALVIT and others
vs.
MULHOLLAN & CARNAL.

To Charles Mulhollan and Reubin Carnal, of the parish of Rapides.

You are hereby summoned to attend at the clerk's office, in the town of Alexandria, and comply with the prayer of the annexed petition, or file your answer thereto in writing, in the office of the clerk of the 6th district court, in and for the parish of Rapides, on the fifth Monday of this month, if 11 days shall remain between the time of the service hereof and the said 5th Monday of this month, but if so many days shall not remain, then in 11 days after the service thereof.

Witness the honorable Henry Boyce, judge of the said court, this 24th day of April, 1838.

CHAS. WILSON,
Dy. Clerk.

Service.

Rec'd Tuesday, 24th April, 1838, and 28th same month, duly served Reubin Carnal, in person, with a copy of this citation and petition annexed; also duly served Charles Mulhollan, in person, with a copy of this citation and petition annexed, this 30th April, 1838.

C. V. LEEDROUX,
D'y Sh'ff.

Extract from the minutes.

Monday morning 10 o'clock, May 14, 1838.

WILLIAM J. CALVIT and others
vs.
CARNAL & MULHOLLAN.

Judgment by default as to Mulhollin.

Answer of Carnal.

6th district court, Rapides, Louisiana.

WILLIAM J. CALVIT and others
vs.
MULHOLLIN & CARNAL.

Reubin Carnal, of this parish, one of the defendants in the above entitled suit, for answer to plaintiffs petition, denies all and singular the allegations therein contained; and for further answer, says that he purchased the land for which he is now sued from Charles Mulhollin, of this parish, authentic act, (a certified copy of which is hereto annexed and made part of this answer,) passed before Thomas C. Scott, par. judge of the parish of Rapides, bearing date April 1, 1838, and of record in the office of the parish judge of this parish; and that said Mulhollin is bound to defend his title to said land, therefore he prays that his said vendor, Charles Mulhollin, may be duly cited to defend him in warranty in this suit, and that in case of judgment against him, your honorable court will render, on the same, judgment in his favor against his said vendor.

THOMAS & OGDEN,
for Def's.

Filed May 8, 1838.

J. B. SCOTT,
Clerk.

Deed made part of answer.

Before me, Thomas C. Scott, parish judge in and for the parish of Rapides, and the undersigned witnesses, came Charles Mulhollin, inhabitant of the said parish of Rapides, who acknowledged that for the consideration hereinafter expressed, he has bargained, sold, transferred, and delivered, and by these presents doth bargain, sell, transfer, and deliver unto Reubin Carnal, also of the parish of Rapides, a certain tract or parcel of land situated, lying, and being in the parish of Rapides, on the bayou La Mourie, and bounded as follows:

Beginning at the upper corner of a tract of land which was sold by the said Charles Mulhollin to Nath'l Parham, and running thence up the right bank of bayou La Mourie to a small sweet gum, twelve arpents distance above, at Parham's corner, on a direct line, equal to 34.91 chs.; thence S. 69° W. 86 chs. and 65 links to a post on the N. E. side line of Icr. Grumerell's claim, twenty arpents from the N. W. corner of said claim, on bayou Bouef; thence 8.53° E., 58.20 chs. to a post; thence south 49.30 E. 29.50 chs. to the S. E. corner of said Grumerell's land, on the upper side line of Miller & Fulton's Indian purchase; thence N. 52 E. with said upper line 73 chs. and 40 links, to a post on the S. W. side of N. Parham's land; thence N. 20 W. with said Parham's line 35 chs. and 60 links to the place of beginning, containing six hundred and seventy-four arpents and 62-100 of an arpent.

To have and to hold the above described premises, together with all the rights, privileges, and appurtenances thereunto belonging to him, the said Reubin Carnal, his heirs and assigns, forever; and the said Charles Mulhollin doth covenant and agree to and with the said Reubin Carnal, that he will warrant and forever defend the above described premises, and every part thereof, against the claim or claims of any and all persons whatever. This sale is made in consideration of the sum eight thousand four hundred and thirty-two dollars and seventy-five cents, which the said Reubin Carnal promises and obliges himself to pay to the said Charles Mulhollin, his heirs and assigns, as follows: four thousand two hundred and twenty-one dollars and sixty-two cents, in hand, which the said Carnal has paid, and the receipt of which the said Mulhollin hereby acknowledges; two thousand one hundred and five dollars and fifty-six cents on or before the first day of March next, and the balance of two thousand one hundred and five dollars and fifty-six cents on or before the first day of March, in the year one thousand eight hundred and thirty, and for which two last mentioned instalments, payable at the periods aforesaid, the said Carnal has made his two certain promissory notes, bearing even date with these presents, and paraphed by the undersigned, parish judge "ne varietur."

In testimony whereof, the said Charles Mulhollin and the said Reubin Carnal, here present and accepting, have hereto subscribed their names at Alexandria, this first day of April, in the year one thousand eight hundred and twenty-eight.

(Signed) C. MULHOLLIN,
REUBIN CARNAL.

Witnesses:
J. B. Scott,
Wm. Armstrong.

Done and passed before me,

TH. C. SCOTT,
Par. Judge.

I certify the foregoing to be a true copy of the original on file and of record in my office. Given under my hand and seal of office as parish judge in and for the parish of Rapides, this 8th day of May, A. D. 1838.

JOHN H. JOHNSON,
Par. Judge.

Signatures inserted in this copy by consent of parties upon trial. The original produced upon trial and proved to be signed by defendants.

GEO. R. KING,
Judge 5 Dist.

Extract from the minutes.

Tuesday, May 15, 1838. The court met, according to adjournment.

WM. J. CALVIT and others
vs.
MULHOLLIN & CARNAL.

Answer filed, and Christian Keller and Francis Foreman called in warrantee, and Geo. W. Waters, Esq., appointed curator ad hoc to represent the absentees.

Answer of Mulhollin.

Rapides district court, April Term, 1838.

The heirs of CALVIT
vs.
MULHOLLIN & CARNAL.

The defendant, C. Mulhollin, for answer, denies all and singular the facts and allegations of the plaintiffs, and hold them to strict legal proof. He expressly denies that the plaintiffs are the legal heirs of Mary Mayes, or that Mary Mayes was the wife of Anthony Calvit; and further answer, the said defendant saith the plaintiffs have no manner of title to any land in his possession. This respondent further saith, that he purchased of Christian Keller and Francis Foreman, of the city of Baltimore, and State of Maryland, who were then commercial co-partners, under the style and firm of Keller and Fore-

man, six arpents front on each side of the bayou Bouf, adjoining the lands of James Brewster below; and if this be the land claimed by the plaintiffs, then this respondent hath a right to call the said Keller and Foreman in warranty to defend this suit; your respondent having purchased from them under a general warrantee title, as will appear by the annexed deed and power of attorney. And your respondent further saith, that since he purchased the said land from Keller and Foreman, he hath made very extensive and valuable improvements and ameliorations thereon, worth at least $20,000; and your respondent having purchased in perfect good faith under a good and valid title, neither the plaintiffs nor any one else can recover a judgment against him for the land without paying him the value of the said improvements and ameliorations; and your respondent further saith, that he and those under whom he claims have held quiet, peaceable, public, and uninterrupted possession of the land herein referred to for more than twenty consecutive years, under good, valid, and bona fide title, translative of property, and in perfect good faith, wherefore he pleads prescription of ten and twenty years; all which premises considered, this respondent prays that he may be quieted and confirmed in his title to the land herein referred to, that the said Keller and Foreman may be cited to defend him in his title and possession as warrantors; and if the plaintiffs shall recover of this respondent, he prays such judgment against his warrantors aforesaid, in solido, as may be warranted by law, justice, and equity; the respondent prays that curators ad hoc may be appointed to represent the said warrantors who are absentees; and further, in case the said plaintiffs shall be entitled to recover, then this respondent prays that he may have judgment against them for the value of the improvements and ameliorations aforesaid, (said $20,000;) and he prays for such other and further relief, order, and decree as may be just and proper, and he prays a trial by jury.

WINN & BRENT,
Att'ys.

Filed May 15, 1838.

J. B. SCOTT,
Clerk.

Power of attorney annexed to answer.

UNITED STATES OF AMERICA,
State of Maryland, to wit:

Be it known, that on the twenty-first day of December, one thousand eight hundred and thirty-seven, before me, John Gill, notary public, dwelling in the city of Baltimore, in the

State aforesaid, came Christian Keller and Francis Foreman, who compose the firm of Keller and Foreman, to me notary, known as such below, named and acknowledged the following letter of attorney to be their act and deed.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal the day and year aforesaid.

JNO. L. GILL,
Not. Pub.

Know all men by these presents, that we, Christian Keller and Francis Foreman, of the city of Baltimore, merchants and co-partners, trading there under the firm of Keller and Foreman, do make, constitute, and appoint William Armstrong, esquire, of Alexandria, in the State of Louisiana, our true and lawful attorney for us, and in our names to make sale, and dispose of to any person or persons a certain tract or parcel of land to us belonging, situate, lying, and being in the parish of Rapide, on the bayou Boeuf, and having a front on each side of said bayou of six arpents, and running back so as to contain the quantity of three hundred and forty arpents, more or less, adjoining lands of the estate of Challan above, and James Brewster below, being the same acquired by us by purchase of A. J. Davis, of the parish of Rapides, by *by* the deed of record in the office of the parish judge of the parish of Rapides, together with all the rights, privileges, and appurtenances thereto belonging, to receive and give receipts for the consideration money which the same may sell for, and on payment thereof to make, sign, seal, acknowledge, and deliver to the purchaser thereof a deed of assignment and transfer thereof, in due form of law, with power also an *an* attorney or attorneys under him for that purpose to make and substitute, and to do all lawful acts requisite for the effecting the premises, hereby ratifying and confirming all that our said attorney or his substitute shall do therein by virtue hereof.

In witness whereof, we have hereunto set our hands and affixed our seals the twenty-first day of December, in the year of our Lord one thousand eight hundred and twenty-seven.

CHRISTIAN KELLER,
FRANCIS FOREMAN.

Signed, sealed, and delivered in the presence of—

JNO. GILL,
Not. Pub.
R. H. LOWRY.

I certify the foregoing to be a true copy of the original on file and of record in my office. Given under my hand and seal of office as parish judge in and for the parish of Rapides, this 9th day of May, 1838.

[SEAL.] JOHN H. JOHNSON, *Par. Judge.*

Deed annexed to answer.

Before me, Thomas C. Scott, parish judge in and for the parish of Rapides, and the undersigned witnesses, came Christian Keller and Francis Foreman, composing the firm of Keller & Foreman, of Baltimore, by William Armstrong, of the parish of Rapides, their attorney in fact, who acknowledged that for the consideration hereinafter expressed, they have bargained, sold, transferred, and delivered, and by these presents do bargain, sell, transfer, and deliver unto Charles Mulhollan, of the parish of Rapides, his heirs and assigns forever, a certain tract or parcel of land situate, lying, and being in the parish of Rapides, on the bayou Boeuf, and having a front on each side of said bayou of six arpents, and running back so as to contain the quantity of three hundred and forty arpents, and adjoining lands formerly belonging to Challan above, and *and* land formerly belonging to James Brewster below, being the same purchased by the said Keller and Foreman from A. J. Davis, together with all the rights, privileges, and appurtenances thereto belonging; and the said Keller and Foreman, by their attorney in fact aforesaid, do covenant and agree to and with the said Charles Mulhollin, that they will warrant and forever defend the above described premises against the claim or claims of their heirs and those claiming by, from, or under them and against the claim or claims of all persons whatever. This sale is made in consideration of three thousand four hundred dollars, which the said Mulhollin promises and obliges himself to pay or cause to be paid to the said Keller and Foreman, as follows: fifteen hundred dollars in hand, which has been paid by the said Mulhollan to the said Armstrong, attorney in fact for Keller & Foreman, and the receipt of which is hereby acknowledged, and the balance of nineteen hundred dollars in two equal annual instalments, from the date hereof; and for the said, Charles Mulhollan and John Mulhollin have given their two certain promissory notes, payable at the periods of payment above expressed, at the office of discount and deposit of the bank of the United States at New Orleans, and bearing same date with these presents, and which notes made in favor of William Armstrong are now signed by the said Charles Mulhollin, who also engaged that they shall be also signed by the said John Mulhollin, and to secure the payment thereof the premises above described are hereby mortgaged.

In testimony whereof, the said Keller and Foreman, by their attorney in fact aforesaid, and the said Charles Mulhollin, here present and accepting, have hereto subscribed their names in presence of the said parish judge and subscribing witnesses, at

Alexandria, this first day of April, in the year of our Lord one thousand eight hundred and twenty-eight.

WM. ARMSTRONG,
Attorney in fact for
KELLER and FOREMAN.
CH. MULHOLLAN.

Witnesses:
REUBIN CARNAL,
J. B. SCOTT.

Done before me.

TH. C. SCOTT, *Par. Judge.*

Release of mortgage.

I hereby release and discharge this mortgage, it having been fully paid and satisfied.

Alexandria, February 18, 1831.

Attest: WM. ARMSTRONG,
J. B. SCOTT, *N. P.*

I certify the foregoing to be a true copy from the original on file and of record in my office. Given under my hand and seal of office as parish judge, in and for the parish of Rapides, this 2d day of March, 1831.

TH. C. SCOTT, *P. J.*

Citation to warrantors.

State of Louisiana, 6 district court, parish of Rapides.

The heirs of CALVIT
vs.
MULHOLLAN & CARNAL.

To Geo. K. Waters, curator ad hoc, of the parish of Rapides:

You are hereby summoned to attend at the clerk's office in the town of Alexandria, and comply with the prayer of the annexed petition, or file your answer thereto in writing, in the office of the clerk of the 6th district court in and for the parish of Rapides, on the 3d Monday of this month, if ten days shall remain between the time of the service hereof and the 3d Monday of this month, but if so many days shall not remain, then in 10 days after the service thereof. Witness the honorable Henry Boyce, judge of the said court, this 2d day of Nov., 1838.

J. B. SCOTT, *Clerk.*

Service.

Rec'd Tuesday, 6th November, 1838, and same day duly served on Geo. K. Waters, curator ad hoc, with a copy of this citation and petition.

A. B. CHENEY, *Sh'ff.*

Answer of Keller and Foreman.

Sixth District Court, Rapides, November Term, 1838.

The heirs of CALVIT
vs.
MULHOLLAN & CARNAL.

Christian Keller and Francis Foreman, in the above entitled suit, having been called in warranty by one of the defendants, viz., Charles Mulhollan, by their curator ad hoc and attorney, deny all liability as warrantors or liability to the said Mulhollan in any manner through or by the sale with reference to which is this call in warranty, and this defence unavailing, deny all and singular the allegations in plaintiff's petition, plead each and every exception, and each and every defence in the said Mulhollan's answer contained.

WATERS, *for Resp'd.*

These respondents further allege in manner and form aforesaid, that they are the vendees of one A. J. Davis, now deceased, under a full and general warrantee title, and that as such have the right to call the heirs and legal representatives of the said A. J. Davis in warranty to defend them in this suit; therefore, they pray that Hampden Davis, Ellen Davis, Ann Davis, Mary Davis, Eliza Davis, and Susan C. Davis, heirs and legal representatives as aforesaid, may be cited to answer this call in warranty, that a curator ad hoc may be appointed to represent them, they being residents of the county Wilkinson, of the State of Mississippi, and that such judgment be rendered in their favor against the said heirs and legal representatives of the said A. J. Davis as may be rendered against these respondents at the suit of the said Mulhollan as aforesaid, and for general and substantial relief in the premises.

WATERS, *for Respd'ts.*

Filed 30 Nov., 1838.

A. S. BRINGHURST, *Dy. Clerk.*

Extracts from the minutes.

Friday, November 30, 1838. The court met, according to adjournment.

WM. J. CALVIT and others
vs.
MULHOLLAN & CARNAL.

In this case, Purvais, esqr., was appointed by the court attorney ad hoc to represent the absentee.

Tuesday, December 13, 1838. The court met, according to adjournment.

WM. J. CALVIT and others
vs.
MULHOLLAN & CARNAL.

Answer filed by order of the court and call in warranty.

Answer of Davis' heirs.

Sixth Judicial District, November Term, 1838.

Heirs of CALVIT
vs.
MULHOLLAN & CARNAL.

Hampden Davis, Ellen Davis, Ann Davis, Mary Davis, Eliza Davis, Susan C. Davis, heirs and legal representatives of J. A. J. Davis, by their curator ad hoc, deny all liability as warranty in any manner through *through* or by the sale with reference to which this suit is brought; and for further answer, say that their ancestor, said A. J. Davis, died insolvent, and that they, his aforesaid heirs and legal representatives, did not administer to his succession, and are in no wise responsible herein. And they further deny all and singular the allegations contained in the petition, and plead each and every exception that may be pleaded by defendants, Mulhollan, in *in* this suit. And such answer as aforesaid be insufficient, they further say that they are the vendees of one Anthony Calvit by sale to their ancestor, A. J. Davis, which sale is recorded in the office of the parish judge of the parish of Rapides, and a copy of which sale is filed herewith; and they pray that said Anthony Calvit be called in warranty, and that he may be cited to answer this call in warranty, and that such judgment be rendered in their favor against said Anthony Calvit as may be *rendered in their favor against said Anthony Calvit, as may be* rendered against these respondents at the suit of said Keller and Foreman; and further pray for such other relief as to this honorable court may seem just.

GEO. PURVIS,
Curator ad hoc for Respondents.

Filed 13 December, 1838.

J. B. SCOTT, *Clk.*

Citation to A. Calvit.

State of Louisiana, 6 District Court, parish of Rapides.

Heirs of CALVIT
vs.
MULHOLLAN & CARNAL.

To Anthony Calvit, of the parish of Rapides:

You are hereby summoned to attend at the clerk's office, in the town of Alexandria, and comply with the prayer of the annexed answer, or file your answer thereto in writing, in the office of the clerk of the 6 district court in and for the parish of Rapides, on the fourth Monday of November next, if 13 days shall remain between the time of the service hereof and the said fourth Monday of November next; but if so many days shall not remain, then in 13 days after the service thereof.

Witness the honorable Henry Boyce, judge of the said court, this 26 day of June, 1839.

A. C. BRINGHURST, *Clerk.*

Service.

Rec'd Wednesday, the 26 June, 1839, and Friday, 23 of same month, duly served Anthony Calvit in person with a copy of this citation and answer.

SIMON HAIRE, *D. Sh'ff.*

Answer of A. Calvit.

6 Judicial District, parish of Rapides.

Heirs of CALVIT
vs.
MULHOLLAN & CARNAL.

Anthony Calvit having been called in warranty in this suit, for his answer denies all and singular the allegations contained in plaintiff's petition, and prays for general relief.

J. G. BOYCE,
Attorney for A. Calvit.

Filed 18 October, 1839.

Extracts from the minutes.

Wednesday morning, November 27, 1839. The court met, according to adjournment.

WM. J. CALVIT and others
vs.
MULHOLLAN & CARNAL.

In this case, the death of one of the plaintiffs, Wm. J. Calvit,

being suggested, it is ordered that this suit be revived in the name of his legal heirs and representatives, and cause continued.

Friday morning, May 22d, 1840. The court met, according to adjournment.

WM. J. CALVIT and others
vs.
MULHOLLAN & CARNAL.

Continued.

Extracts from the minutes.

Tuesday, May 25. The court met, according to adjournment.

WM. J. CALVIT and others
vs.
MULHOLLAN & CARNAL.

Amended petition filed, and ordered that suit be revived in the name of the heirs and legal representatives of W. J. Calvit, and to take testimony generally.

Saturday, May 29. Court met, according to adjournment.

WM. J. CALVIT and others
vs.
MULHOLLAN & CARNAL.

Amended petition filed.

Amended Petition.

To the honorable Judge of the Sixth Judicial District in and for the parish of Rapides, and State of Louisiana.

The petition of Francis Henderson, tutor of Rosana Calvit, one of the minor heirs of William J. Calvit and Minerva X. Calvit, natural trustrix of Joseph Calvit, Catherine Calvit, and William Calvit, the other minor heirs of the said Calvit, with respect, represent, that since the institution of a suit in your honorable court, wherein William J. Calvit and others are plaintiffs and Charles Mulhollan and Reubin Carnal defendants, and numbered 383 on your honors docket, the said William J. Calvit has died; wherefore, they pray to be made parties to this suit, and they pray for such judgment, order, decree, and relief as is prayed for in the original petition, &c.

F. W. BREWER, *Att'y.*

Filed 29 May, 1841.

C. V. LEEDOUX, *Clerk.*

Extracts from the minutes.

Saturday, December 18. The court met, according to adjournment.

WM. J. CALVIT and others
vs.
MULHOLLAN & CARNAL.

Continued, and ordered by the court that a survey be made.

Wednesday, December 7, 1842. Court met, according to adjournment.

WM. J. CALVIT et al.
vs.
MULHOLLAN & CARNAL.

Case continued by consent.

Answer of Mulhollan to amended petition.

WM. J. CALVIT et al.
MULHOLLAN & CARNAL.

The defendant, Mulhollan, denies all the allegations in plaintiffs, amended petition, and prays for judgment.

BRENT, *Att'y.*

Filed 10 May, 1843.

M. K. ARIAIL, *Dy. Clerk.*

Extract from the minutes.

Monday, May 29, 1843. Court met, according to adjournment.

CALVIT and others
vs.
MULHOLLAN & CARNAL.

Judgment in favor of the defendant.

On motion, ordered that a devolutive appeal be allowed the plaintiffs to the supreme court for the western district of the State of Louisiana, to be holden at Alexandria, returnable to the first Monday of October, 1843, the first day of the *first day of the* next term thereof, on their giving bond and security in the sum of $1,500.

Judgment.

CALVIT and others
v.
C. MULHOLLAN.

In this case, by reason of the law and evidence, it is ordered and decreed that there be judgment in favor of the defendant, and that he be quieted in his title and possession of the land claimed of him, and that the plaintiffs pay the costs of suit to be taxed. Signed in open court this 29 day of May, 1843.

GEO. R. KING,
Judge 5 Dist.

Filed May 20, 1843.

M. R. ARIAL, *Dy. Clk.*

Appeal Bond.

Know all men by these presents, that we, James A. Calvit, as principal, and Michael Ryan, as security, are held and firmly bound unto Charles Mulhollan and Reuben Carnal, their executors, administrators, and assigns, in the sum of one hundred and fifty dollars, and for the payment whereof we bind ourselves, our heirs, executors, and administrators firmly by these presents, dated Alexandria, the 29th day of September, 1843. Whereas the above bounden James A. Calvit has taken an appeal from a certain final judgment rendered against him in the district court for the parish of Rapides, in favor of said Mulhollan and Carnal.

Now, the condition of the above obligation is such, that if the above bound J. A. Calvit shall prosecute his appeal and shall satisfy whatever judgment may be rendered against him, or if the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal, then and in that case the above obligation to be void and null, otherwise the said Michael Ryan, security, shall be liable in his place.

J. A. CALVIT,
MICH. RYAN.

Filed Sept. 29, 1843.

M. R. ARIAIL,
D. Clerk.

Extract from the minutes.

Wednesday, November 26, 1845. Court met, pursuant to adjournment.

CALVIT et al.
vs.
MULHOLLAN et al.

Ordered that the judgment of the supreme court in this case be filed and recorded, and that the same be executed.

Judgment of the Supreme Court.

Appeal from the court of the sixth judicial district for the parish of Rapides.

WM. J. CALVIT et al.
vs.
MULHOLLAN & CARNAL.

We are called upon to revise a judgment rendered in favor

of the defendants, by which they are quieted in their title to and possession of a tract of land claimed of them by the plaintiffs in the right, and as the legal heirs and representatives of their deceased mother.

The facts of the case are these: Mary Mayes, wife of Anthony Calvit, died in May, or on or about the first of June, 1816; she left four children issue of her marriage, to wit, William, Elizabeth, James, and Coleman Calvit, who are the plaintiffs in this cause. Among the property which the sponses possessed at the time of the dissolution of their marriage, there was a tract of land of 340 superficial arpents, being six arpents front on both sides of bayou Boeuf, having on the east side a depth of 40 arpents, and on the west side such a depth as to make 100 superficial arpents, which was acquired during the existence of the marriage, and was community property. Anthony Calvit, after the death of his wife, became the natural tutor of his children, and continued to keep the community property in his possession, without taking any step for ought it appears to open the succession of his dead wife in the name of his children, who were all minors, and placed by law under his natural tutorship. It is not shown that he ever made any inventory, and if any proceeding ever took place in relation to the estate of his wife, inherited by the plaintiffs, none could be found in the parish judge's office or anywhere else.

It further appears from the evidence, that Anthony Calvit, who was only entitled to one-half of the tract of land above described, sold the whole of it on the 2d of March, 1820, to one Davis, under whom the defendants claim through divers mesne conveyances; and that said defendants, as well as those under whom they claim, have always peaceably and uninterruptedly possessed this property from the date of the act of sale from Calvit to Davis, up to the 23d of April, 1838, when the present suit was instituted to evict them from one undivided half thereof.

The defendants rely upon the prescription of ten years, which they contend was acquired by their authors against the succession of the plaintiffs' mother, considered as a vacant estate long before the institution of this suit; but in the event of eviction, they pray that they may be compensated for the value of improvements, &c., &c., put upon the land.

All the succession vendors of the property in dispute were also regularly called in warranty, up to Anthony Calvit himself, who joined issue by denying all the allegations contained in the plaintiffs petition.

The record shows that James Calvit was born in the year 1800; he therefore became of age in 1821: Elizabeth Calvit was born in 1804; she became of age in 1825: James Calvit

was born in 1813; he became of age in 1834: and Coleman Calvit was born in 1815, and he became of age in 1836.

It is clear then that prescription has run against the two eldest, as more than ten years has elapsed since their majority before the institution of this suit. But is it so with regard to the two other plaintiffs, who only became of age in 1834 and 1836? It is contended by the defendants' counsel, that according to the provisions of the old civil code of 1808, under which the succession of the plaintiffs' mother was opened, said succession was to be then considered as a vacant one, as it was claimed by no one of her heirs; and that in such case prescription being by law allowed to run against a vacant estate, such prescription was acquired by the defendants or those under whom they hold, as to all the plaintiffs long before the institution of this suit.

The counsel relies on the case of Davis *vs.* Elkins, 9 L. & R., 135, to show that Mary Mayes' succession could not be considered in any other light but as a vacant one, against which prescription runs under the old civil code, as well as under the La. C., art. 3,492.

We are not disposed to contest the correctness of the jurisprudence established on this subject by our predecessors under the provisions contained in the old civil code. We shall even give to the defendants the benefit of the time which may have run between the sale made by Calvit on the 2d of March, 1820, and the 20 of June, 1825, which is the date of the promulgation of the Louisiana code, so as to allow them five years three months and eighteen days, as so much time acquired under the old code, by virtue of the right of prescription then running against a vacant estate. But the question presents itself: did not the provisions of the law, existing under the old code on the subject, undergo a material change by those enacted in the Louisiana code? Or in other words, could the succession of Mary Mayes be yet considered as a vacant one after the promulgation of the new code? If not, the time necessary to acquire prescription having not been completed under the former law because suspended by the new law, and could not continue to run until the plaintiff had obtained the age of majority.

On this subject we take it to be a true and correct doctrine to say, that the time which precedes the change of legislation on the altering of the period of prescription, should best be reckoned according to the ancient law.

And that after the expiration of the suspension operated by the new provisions, it should be followed according to the new law, 6 L. R., 674, 11 L. R., 59 & 61. For instance, suppose that under a former law, prescription was permitted to run against minors, but that by a subsequent law such prescription would be suspended during minority, and could only begin to run from

the time of majority; could it be doubted that in such case, the new provision would have its effect so far as to suspend for the future the time necessary to acquire prescription between the enactment of the new law and the age of majority? Surely not. The right or time previously acquired would not be destroyed, for on the contrary, it should be added to the period acquired after majority to complete the prescription under the new law. If this doctrine be correct, it is obvious that if by the change of legislation the succession of Mary Mayes ceased to be a vacant estate, the prescription already commenced became suspended in favor of her minor heirs, and could only continue to run after their age of majority.

It is proper remark that the case of Davis heirs against Elkins and al., 9 L. R., 135, was decided entirely on principles established in the old civil code; so was the case of Poultney's heirs *vs.* Cecil, &c., and 8 L. R., 411. But the jurisprudence of this court, under the provisions of the Louisiana code, appears to be so well settled on the question under consideration, that it can hardly be considered now as a new and open question.

In the case of O'Donnell *vs.* Lobill, 2 L. and R., 300, this question underwent a thorough examination, and it was there held, that under the express provisions of the Louisiana *code*, (which we do not deem necessary to review much at length,) the succession is represented by the heir who is seized of it from the moment it is opened. L. C., art. 934, 935, 936, 937, 938, and 939. In every one of these articles, our law recognizes that a succession is acquired by the lawful heir immediately after the death of the deceased person to whom he succeeds; and that this right is so acquired by the operation of the law above, before he has taken any step to put himself in possession, or has expressed any will to accept it; thus, the right of possession which the deceased had, continues in the person of the heir, as if there had been no interruption, and independent of the fact of possession, and such right continues in the person of the heir with all its defects and its advantages, as the change in the proprietor produces no alteration in the nature of the possession.

Under a correct application of these provisions of our laws to the present case, how can it be said that the estate of Mary Mayers was a vacant one? Can it be pretended that a curator could have been appointed to the succession as if it had been vacant? Were not the heirs in possession of the property in dispute? Was not said property in the possession of their natural tutor, who necessarily held it for them and in their names? To these questions it is answered that they took no step to claim the estate, and that therefore, by the terms of the art. 1,088, it was vacant; they could only act through and by their tutor. It was his duty to take possession of the effects of the estate for

them, and to pursue them for their benefit; and so he did, so far as to put himself in possession of the property, but his not pursuing it to restore it to his children, at the age of their majority, cannot turn to their prejudice so as to deprive them of their rights as heirs of their mother. But the law says in positive terms that it is not necessary to take any step to claim the succession, or to express any will to accept it, (art. 935,) and that the heir succeeds to the deceased from the instant of his death, and transmits his rights to his heirs, although he himself have not accepted it, and even in case he was ignorant that the succession was opened in his favor. L. C., art. 1,938. This doctrine was also fully recognized in Robin *vs* Castil, 7 L. R., 295, and Addison *vs.* Savings' Bank, 15 L. R., 527.

But it has been urged that by the article 940 of the L. C., the right of the heir to the succession is in suspense until he accepts or renounces; and hence, it is argued that his right is incomplete, that is to say, that he is not vested with the inheritance so as to entitle him to keep it, unless he declares that he accepts it absolutely.

This article immediately follows those which are the basis of our opinion, that the heir acquires the succession by the mere effect of the law, and we cannot suppose that the lawmaker ever intended to destroy the effect of the provisions, particularly as the art. 940 recognizes again, in positive terms, that the succession is acquired by the heir from the moment of the death of the deceased.

We understand this article to mean, that although the heir represents the deceased as fully as if there had been no interruption, his right to the inheritance shall only become defective after he has accepted it, but that he also be at liberty to reject it. This is only a modification of the exercise of the right; it is established not only for his benefit, but also for that of the creditors of the succession; but the right exists, it is acquired by the heir who represents the deceased, and if it is suspended, it is only with a view of compelling him to declare within the legal days; to deliberate whether he is determined to keep the estate or to abandon it.

Again: the succession is represented by the heir, and therefore it cannot be vacant. There is a vast difference between an estate represented by the heir whose to it is only in suspense, and the fictitious being which was created by the old civil code, but which terminated its existence by the enactment of the Louisiana code.

With regard to minors accepting, renouncing a succession, it is well known that this cannot be done by the tutor alone, and that a succession can never be accepted for them but with the benefit of inventory; L. C. art. 345 and 346; and it seems to us

that if the tutor fails to take the advice of a *of a* family meeting, the minors cannot suffer from his neglect.

In order to strengthen our position, it may be proper to remark, that it is not shown in this case that Mary Mayes owed any debt at the time of her death, and that any creditor was interested in causing an inventory to be made, and an administration to be appointed. Now, our law under the art. 1,029 L. C. has so far provided for the case when the heirs do not take the necessary measures to cause the seals to be affixed to an inventory made of the effects of the succession, that it has allowed to the creditors the right to cite the heirs before the judge, in order to oblige them to declare whether they accept or renounce the succession. The law has not said that the estate shall be considered vacant; on the contrary, the heirs, by the very reason that they are entitled to the succession by the operation of the law alone, must be called upon to declare their intention as to accepting or renouncing the estate which they have acquired.

In the case of O'Donald *vs.* Soldell, already cited, this court said: "It is only after the heir has been called by the creditors to renounce or take the inheritance, that an administrator can be appointed" a fortiori, would it have been illegal and irregular to appoint "a curator to the estate of Mary Mayes as to a vacant one. This is in accordance with the French jurisprudence on this subject. Rogron, note on art. 811 of Nap. C., 4 Toullier, No. 396, 4 Duranton, (Brussels,) Nos. 60, 61, 62, 63, and 64.

In coming to the conclusion that the succession of Mary Mayes never was under the new code a vacant estate, against which prescription could run, or that it had ceased to be such at the time of the promulgation of the Louisiana code, at which time the heirs became seized with the inheritance by them acquired by the mere operation of law, we give full effect to the provisions of our law that says that "miners cannot be prescribed against except in the case provided by law. L. C. 3,488. Indeed, if such prescription had begun to run against them under the old law, under the supposition that the estate of their mother had become vacant, it is clear that it was suspended by the promulgation of the new code, and that if from the time of their majority up to the institution of this suit that has not been a sufficient length of time to complete the prescription, the claim of two of the plaintiffs to their respective portions of the tract of land sold by their father must prevail. James Calvit, according to the evidence, became of age in 1834, and Coleman Calvit attained the age of majority in 1836: the time that has run from these periods up to 23d of April, 1838, is about four years for one and two years for the other, which, added to the five years three months and eighteen days which had run under the old code, are not sufficient to complete the prescription of ten years.

With this view of the question, we are of opinion that *that* the claim set up by William and Elizabeth Calvit is prescribed, but that James Calvit and Coleman Calvit are entitled to recover respectively one undivided eighth of the tract of land described in their petition, which makes for both one-fourth of the whole tract.

With regard to the question of improvements, we think that as the case stands, we cannot take it under our consideration. It is true that the record contains evidence upon the subject, which would perhaps be sufficient enable us to liquidate the amount due to the parties respectively for the value of their improvements, and for the reimbursements of the rents and profits; but as this part of this case was not acted upon by the court a ques, we cannot assume original jurisdiction; and at any rate we think it is proper that the case should be remanded for that purpose, as it must also be sent back for the purpose of settling the question of warranty resulting from the eviction between the different warrantors called in this suit. It is therefore ordered, adjudged, and decreed, that the judgment of the district court, so far as it regards the claim of the plaintiffs, James Calvit and Coleman Calvit, be annulled, avoided and revised; that said James and Coleman Calvit do recover of the defendant, each and respectively, one undivided eighth of the tract of land described in their petition; that they be quieted in their title to the said undivided eighth hereby decreed to them respectively as against the defendant, or any other person claiming through or under them; and that with regard to the question of improvements and rents and profits presented by the pleadings, so far as James and Coleman Calvit are interested, and to the question of damages between the warrantors, this case be remanded to the lower court to be proceeded on according to law. And it is further ordered, that with regard to William and Elizabeth Calvit, the judgment appealed from be affirmed; one half of the costs in both courts to be paid by the defendants and appellants, and the other half to be born by William and Elizabeth Calvit, two of the appellants.

On a rehearing.

W. J. Calvit et al.
vs.
Mulhollin et al.

The principal argument on which a rehearing was asked and allowed in the cause, is based on the position taken by the defendants' counsel, that the character of the succession of the plaintiffs' mother should be exclusively determined by the law in force at the time of its opening; that was then a vacant one,

and that it must continue to be so under the new code as it was under the old one, and hence it has been ably and strenuously contended that the defendants *that the defendants* had acquired certain rights against the succession which the new law could not affect, and that those rights consisting in being entitled to complete the prescription which had begun to run under the old code; such prescription, if completed under the new code, should avail said defendants against heirs who have not accepted the succession of their mother until long after said prescription was acquired. We are free to confess that these arguments had shaken our opinion, and that their *pedasibility* made us doubt for some time the correctness of our previous decision; but we have found, after a close re-examination of the question, that they were more specious than solid, and that it was not difficult to demonstrate it.

The counsel has greatly misunderstood us when he says that our construction of the law of 1825 goes so far as to give to the heirs the seizure of the succession from the moment it was opened under the code of 1808; on the contrary, we took for granted, since it had been so decided by this court in the case of Davis' heirs *vs.* Elkins, 9 L. R., 145, that it was vacant under the code of 1825; and we gave his clients, against two of the plaintiffs whose claim was defeated thereby, the benefit of the time which had run from the date of the sale, from Calvit to them, (2d of March, 1820,) but considering the prescription as suspended during all the plaintiffs' minority, from the effect of the new exactments on their rights, and permitting to continue to run and be completed after their attaining the age of majority. The defendants had acquired no right to the prescription contended for at the time of the promulgation of the new code, and how can such right, when not existing, be affected by our construction of the new law, when at the time of its enactment it could have been interrupted by other causes? Troplong, in his Treatise on Prescription, No. 1,075, En precipe eme treatise commencie ne forme pas un devit eventual acques, en effet sion la contidere comne meyen a acquerer elle est si peu em droit acquis qu'elle peut etre a tant moment effaceé par une interruption, elle n'at encore gu'nn grmne. facille â delenihe gu'nne esperance sujette a deception.

Here, it is true, the defendants had commenced their prescription under a law which would, perhaps, permitted them to complete if it had not been changed, that is to say, if the succession of Mary Mayes had continued for ten years to be considered as vacant, and if it had not been suspended by the minority of her heirs, to whom the new law gave an immediate right to be seized of it, and to be viewed as the owners of the property which she had left at the time of her death. But this is not giving to the new law a retroactive effect. This not affecting

rights previously acquired; the prescription which had commenced was not before the new law, running against the heirs; it was against the presumed vacant estate of their mother, and when from the provisions of the new code it ceased to be vacant, could the prescription continue to run? Surely not, for it would then have run against minors vested with the seizure of the estate of their parent. It seems to us perfectly clear, that from the time the law was altered so as to change the nature of a succession, and devolve it upon the legal heirs without any of the formalities previously required to claim or accept it, and without affecting any legal right previously acquired by third persons, such succession could validly change its denomination, and from a vacant one become at once a succession ab inteste. Here again no right had been acquired, for it cannot be pretended that the right to a part of the time necessary to prescribe, can be considered as a vested right; such right is only vested when the prescription is completed, and until then, it may be destroyed by law or by circumstances amounting to a suspension or interruption; the time for prescribing may be shortened or lengthened, as a new law may provide; and surely it cannot be contended that such a law would have a retroactive effect, if lengthening the time necessary to prescribe under a former law, it subjected the possession to a longer period of possession than was required under the old law. No right being acquired none would be affected, and the possession having the benefit of the time which would have run under the old law, would be obliged to complete it according to the new law. 6 L. R., 674, 11 L. R., 59 and 61.

But we cannot understand how it can be urged that the defendants' right to a prescription which was not acquired at the time of the promulgation of the new code, was affected by the enactment of its provisions; yet it is well known that a vacant estate declared to be so at the time of its opening, is always subject to the contingency of its ceasing to be vacant when the heirs of the deceased claim it, and sue the curators to be put in possession of it, and to compel him to account; and if such heirs are minors, could a prescription commence against the estate while it was vacant continue to run against them?

Certainly not; it becomes suspended during the minority, C. C., art. 3,488, and may duly continue to run after they have attained the age of minority. Here the new law has *has* done nothing but what the parties themselves, being minors, would have been *enabled* at any time to do if they had been under the tutorship of a person well disposed to take care of their interest and to administer their estate in a proper manner. The rights of the heirs were not changed, or in any way bettered by the new law; they were under both laws vested with the legal and incontrovertible right of inheriting the succession of their

mother, and claiming the estate as her heirs; and the only change which the new law has made was, that under its provisions the heir became seized of it by the mere operation of the law, and before their taking any step to put themselves in possession, or expressing any will to accept it. C. C., art. 934 and foll.

Whilst under the former law their failing to claim it caused it to be considered as a vacant succession; tho' the heirs, all minors, were present in the State, and incapable of acting for themselves, and tho' their tutor was in possession of their property as being derived from the estate of their mother, and was thereby enabled to dispose of it to their prejudice: forsooth, the succession of Mary Mayes being vacant, the purchaser would acquire a good title by prescription before the minors could have attained the age of majority. So, however, it has been decided by this court in the case of Davis vs. Elkins; but as it is not *one* object to controvert that decision or to question its correctness in this case, we shall leave it undisturbed, however unjust it may be in its consequences, until we have occasion to prevent its direct application, if we should be of opinion that it is unfounded in law and in equity. It is sufficient for us here to say that the estate of Mary Mayes ceased to be vacant after the enactment of the new code, in the same manner as if it had been claimed by her heirs; that those heirs became seized of it, altho' it has been opened under the old law, and considered as a vacant one; that no right had been acquired by any one to its property by prescription or otherwise which was or could be affected or impaired by the new law; that this is not giving any retroactive effect to the code of 1825, by which the previous vested rights of the parties were not changed or even modified, but only applying its provisions to the actual situation of the plaintiffs at the time of its promulgation; and that we see no reason why our previous opinion should be disturbed on the subject of the prescription *pleade* by the defendants.

But the counsel has suggested that his clients ought to have the opportunity of showing on a new trial in the lower court that the price received by Calvit for the property in dispute was applied to the payment of the debts due by the community existing between himself and his wife, the ancestor of the plaintiffs, in whose right they claim. This, we think, is right, and must be allowed, as, though the plaintiffs are entitled to recover their undivided portion of their land illegally alienated by their maternal tutor, they should not be permitted to enrich themselves at the expense of the defendants, who are clearly entitled to the reimbursement of the sums paid for the benefit of the community to the proportion of the rights of the two plaintiffs, who have succeeded in this action in and to the property formerly belonging to the same community, and this cause must

also be remanded for that purpose. See Dagnin et als. vs. Corion et als., 8 N. S., 608.

It is therefore ordered and decreed that our former judgment be maintained, so far as it goes, and that in addition to the purposes for which this cause was ordered to be remanded, it be also remanded for the further purpose of ascertaining whether the price received by the plaintiffs' father and tutor for the property in dispute, was applied to the payment of the community debts, to which James and Coleman Calvitt are bound to contribute in proportion to their rights thereto; and that in the mean time no writ of possession issue until they have paid the amount which may be found to be due by them on the trial of this cause in the lower court under our first and present decree.

Filed October 29, 1845.

M. R. ARIAIL, *Dy. Clk.*

Clerk's office of the Supreme Court for the western district of the State of Louisiana, at Alexandria.

I certify the foregoing to be a true copy of the opinion and judgment in the above recited case, as taken from the original in this office. In testimony whereof, I hereunto set my hand and affix the seal of the said court, this 7 day of November, A. D. 1845.

M. R. ARIAIL, *Dy. Clk.*

Filed 26 November, 1845.

M. R. ARIAIL, *Dy. Clk.*

Extracts from the Minutes.

Wednesday, November 11, 1846. Court met, pursuant to adjournment.

CALVIT et al.
vs.
MULHOLLAN et al. } No. 383.

The death of the defendant, C. Mulhollan, being suggested, on *mo.* of plaintiffs' counsel, ordered that this suit be revived in the name of his legal representatives.

Thursday, April 29, 1847. Court met, pursuant to adjournment.

CALVIT et al.
vs.
MULHOLLAN et al. } No. 383.

G. R. Water, esq., appointed curator ad hoc to represent the absentees, Keller and Foreman.

The parties waive trial by a jury.

Extract from the Minutes.

Tuesday, April 11, 1848. The court met.

CALVIT et al.
vs.
MULHOLLAN et al. } No. 383.

On motion, ordered that the parties have leave to take testimony generally in and out of the State. Cause continued.

Answer of Mulhollan's heirs.

In district court, parish of Rapides.

WM. J. CALVIT et al.
vs.
MULHOLLAN & CARNAL. } No. 383.

Charles H. Flower, a resident of the parish of Rapides, and Alice Flower, a rised out of the parish of east Feliciana, heirs and universal legatees of the defendant, Charles Mulhollan, came into court and make themselves parties to this suit in their capacity as heirs and legatees as aforesaid, and adopt the answers and defences set up by the original defendants, the said Mulhollan, and ask for a judgment over *over* against the warrantors, as prayed for by him, in case judgment be rendered in favor of plaintiffs, and for general relief in the premises.

O. N. OGDEN.

District court, parish Rapides. Filed May 30, 1853.
M. R. ARIAIL, *Clerk*.

Extract from the Minutes.

Monday, May 30, 1853. The court met.

W. J. CALVIT et al.
vs.
MULHOLLAN & CARNAL. } No. 383.

Judgment in favor of Charles Flowers and Alice Flowers, the present plaintiffs, against Christopher Keller and Francis Foreman, in solido, for the sum of $850, with 5 per cent. interest per annum in't, from Nov. 14, 1846, until paid, and costs of suit.

Judgment.

In district court, parish of Rapides.

WILLIAM J. CALVIT et al.
vs.
MULHOLLAN & CARNAL. } No. 383.

In this case, by reason of the decree of the supreme court,

one-fourth of the tract of land sued for having been adjudged and decreed to belong to James and Coleman Calvit; and whereas it appears that the legal representatives of Charles Mulhollan have purchased the claims of said Calvits for the sum of twenty-four hundred dollars; and whereas it further appears that Christopher Keller and Francis Foreman, a commercial partnership of the city of Baltimore, sold the said tract of land to the said Charles Mulhollan for thirty-four hundred dollars, and that the said Keller and Foreman have been called in warranty by the Mulhollan praying for such judgment against them as might be rendered against him; and whereas his legal representatives have been enriched by the decree of the court from one-fourth of the tract of land aforesaid, and the said Keller and Foreman are bound to warrant them for one-fourth of the price of the land, and make good the same to them: Now, therefore, by reason of the premises and the law, and evidence being in favor of Charles H. Flower and Alice Flower, the heirs and universal legatees of said Mulhollan, who have come in and made themselves parties to this suit in their capacity as heirs and legatees as aforesaid, it is ordered, adjudged, and decreed that they do recover jointly from the said Christopher Keller and Francis Foreman, in solido, the sum of eight hundred and fifty dollars, with interest thereon *as* five per centum per annum, from the fourteenth day of November, 1846, until paid, and the costs of this suit to be taxed.

Done and signed in open court, this 31 day of May, 1853.

R. CUSHMAN,
Judge 13 *Dist.*

District court, parish Rapides.

Filed 31 May, 1853.

M. R. ARAIL, *Cl'k.*

Clerk's office.

District court parish of Rapides, State of Louisiana.

I certify that the foregoing thirty-eight pages contain a true and perfect copy of the entire record of suit, entitled William J. Calvit et al. Mulholland and Carnal, No. 383 of the docket.

Given under my hand and the seal of said court, at Alexan-
[SEAL.] dria, the 2d day of April, A. D. 1855.

M. R. ARIAIL, *Cl'k.*

I, Ralph Cushman, sole judge of the district court for the thirteenth judicial district of the State of Louisiana, including the parish of Rapides, certify that M. R. Ariail, whose genuine signature appears to the above certificate, was at the date thereof clerk of the district court for the parish of Rapides aforesaid, duly commissioned and qualified, and that his attestation is in due form of law. Signed the 5 day of April, A. D. 1855.

RALPH CUSHMAN, *Judge* 13 *District.*

And also read in evidence the commission issued in this cause, and the depositions returned therewith, made a part hereof.

Commission.

UNITED STATES OF AMERICA,
District of Maryland, to wit:

[SEAL.] To Gwinn Harris, of Louisiana, esq., greeting:

Be it known, that you are appointed commissioner to examine evidences in a cause now depending in the circuit court of the United States for the fourth circuit in and for the Maryland district, between Charles Flowers and Alice Flowers, plaintiffs, and Francis Foreman, surviving partner of Keller & Foreman, defendant; therefore you are requested, having first taken the oath hereunto annexed, and also administered the annexed oath to the person whom you shall appoint as clerk to attend the execution of this commission, that at such time and place as to you shall seem convenient, you cause to come before you all such evidences as shall be named or produced to you by either plaintiffs or defendant; and that you examine them upon their corporal oaths, to be by you administered upon the holy evangely of Almighty God touching their knowledge or remembrance of any thing that may relate to the cause aforesaid; and having reduced the depositions of the witness so taken by you into writing, you send the same, with this commission closed, under your hand and seal, to the said circuit court with all convenient speed.

Witness the honorable Roger B. Taney, chief justice of our Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and fifty-five.

R. J. B.
BROWN & BRUNE.

Issued 13 Oct., 1856. THO. SPICER,
Cl'k Cir'ct C't.

Commissioner's oath.

You shall, according to the best of your skill and knowledge, truly, faithfully, and without partiality to any or either of our parties, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission hereunto annexed upon the interrogatories, now, or which may hereafter, before the said commission is closed, be produced to and left with you by either party, so help you God.

GWINN HARRIS.

The above oath was administered by me, this first day of November, eighteen hundred and fifty-six, to Gwinn Harris, commissioner within named.

ROESMOND LEGRAS,
Justice of the Peace in and
for the parish of Rapides, and
State of Louisiana.

Clerk's oath.

You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take, write down, and transcribe the depositions of all and every the witness and witnesses *produce* before and examined by the commissioner, named in the commission hereunto annexed, as far forth as you are directed and employed by the said commissioner, to take, write down, and transcribe the said depositions, or any of them, so help you God.

Plaintiff's interrogatories.

U. S. Circuit Court.

FLOWERS
vs.
FOREMAN.

Interrogatories to be propounded to witnesses produced on the part of the above plaintiff:

1. State whether you knew Charles Mulholland, of Louisiana, and whether he is alive or dead; and if dead, when did he die?

2. State what you know touching the next of kin and heirs of said Charles Mulholland, and give their names fully; and if he left a will, please annex as a part of your answer hereto a copy of said will, duly certified and authenticated, according to the requirement of the act of Congress in such case made and provided.

3. State what you know about the family of Anthony Calvit, deceased, on the 13 January, 1816, when he purchased a tract of land on bayou Boeuf, in the parish of Rapides, Louisiana, from a certain John Rippey; and state particularly whether at said date the said Anthony Calvit had a wife living, and what her name was; and if dead, when she died, and what children she left, if any, and the full names and ages of said children; and also, whether or not said Anthony Calvit is dead or alive, and if dead, when he died?

4. State what you know about the plaintiffs, Charles H. Flowers and Alice Flower, as heirs of Charles Mulhollan, having

paid to the children of Mrs. Anthony Calvit, or any of them, and particularly to James and Coleman Calvit, a sum or sums of money as and for their claim and interest in and to a tract of land mentioned and described in a decree from Christian or Christopher Keller, composing the firm of Keller and Foreman, of Baltimore, to Charles Mulhollan, dated the 1 April, 1828; and particularly state what amount was so paid to said children of Mrs. Anthony Calvit, or any of them, and the date of said payment; and further state what you know about said payment being a full value for the portion or interest of said parties to whom the payment was made in said lands, and what you know about said payment having been bona fide made in full extinguishment of all claim or interest in said parties so receiving the same in and to said lands?

5. State any other matter or thing material in the trial of the above case?

ROBERT J. BRENT,
For Plaintiffs.

Agreement.

It is agreed in the above case that a commission issue forthwith to Gwinn Harris, esq., of Louisiana, to take evidence in the within entitled case.

ROBERT J. BRENT,
For Plff's.

But with the understanding that there shall be no continuance of the case, in case the commission is not returned in time for trial.

BROWN & BRUNE,
For Def'dt.

Cross Interrogatories.

CHARLES FLOWERS & ALICE FLOWERS
vs.
FRANCIS FOREMAN.

Cross interrogatories to be propounded to the witnesses who may be produced in this case on behalf of the plaintiffs:

1. What is your age and your occupation, and where do you reside; are you in any way connected with any of the parties to this suit, and have you any interest therein?

2. State whether in the testimony you have given in reply to the plaintiffs' interrogatories, you have in any matter testified from hearsay, and not from your own personal knowledge; and if you have testified from hearsay, state particularly in what matters?

3. State particularly how you acquired the information concerning each and every fact about which you so testify in reply to the plaintiffs' interrogatories?

BROWN & BRUNE,
For Defend't.

U. S. Circuit Court, 4 circuit, in and for Maryland district.

CHARLES FLOWER & ALICE FLOWER
vs.
FRANCIS FOREMAN.

Depositions of witnesses produced, sworn, and examined on the first day of November, in the year of our Lord eighteen hundred and fifty-six, at my office in the town of Alexandria, Louisiana, by virtue of the annexed commission. I, the undersigned commissioner, having first taken the oath to said commission annexed in due form of law before , a justice of the peace in and for the parish of Rapides, State of Louisiana, as appears by his certificate and signature thereto.

James A. Calvit, of the parish of Rapides, in the State of Louisiana, aged forty-seven years or thereabouts, being produced, sworn, and *examed* on behalf of the plaintiffs, deposeth as follows:

To the first interrogatory on the part of the plaintiffs, he deposes and says:

I knew Charles Mulhollan, of the parish of Rapides, Louisiana; he is dead; he died during the summer or fall of the year 1846.

2. To the second interrogatory on the part of the plaintiffs, he deposes and says:

I know nothing of my own knowledge in relation to the heirs and next of kin of Charles Mulhollan; I have understood, however, that he left at his decease a sister, (Mrs. Flowers,) and a *newphew* and niece, the children of the said Mrs. Flowers, to wit: Charles H. Flowers and Alice Flowers; the latter was subsequently married to William Salk, and she has since deceased. I have also understood that Charles Mulhollan left a will which was duly probated. I annex and make a part of this my answer the document marked "A," which is a copy of the said will.

3. To the third interrogatory on the part of the plaintiffs, he deposes and says:

I am a son of Anthony Calvit, deceased, and know that in January, 1816, my mother, the wife of Anthony Calvit, was alive; her maiden name was Mary Mayes; she died in the fall of 1816, as well as I can recollect; she left five children, issue of her marriage with Anthony Calvit, to wit: William J. Calvit,

now dec'd, Elizabeth G. Calvit, now the wife of Alexander Compton, James A. Calvit, (myself,) Josiah S. Calvit, now dec'd, and Coleman M. Calvit. William was born in 1800; Eliza in 1804; myself in 1808; Josiah in 1811 or 1812; and Coleman in 1815. William died in 1839, and Josiah died in 1820. Anthony Calvit, my father, died in 1847, and in the fall of that year.

4. To the fourth interrogatory on the part of the plaintiffs, deposes and says:

I and my brother, Coleman M. Calvit, has recovered a judgment against Charles Mulhollan for the shares claimed by us in right of our mother in the land sued for in the suit of heirs of Calvit *vs.* Mulholland. Witness being pressed for money, offered my brother, Coleman joining me in the proposition, to take twelve hundred dollars each for our interest in the judgment and all our right and demand to the property in dispute, which amount was paid to us by the representatives of Mulholland, and our claims relinquished accordingly. These payments were made to us the 14 November, 1846; the said payments were made bona fide and in full relinquishment of our claims; the amount paid I did not consider adequate, but being pressed for money at the time, we consented to take it.

5. To the fifth interrogatory on the part of the plaintiffs, he deposes and says:

I know nothing more of any importance or that is material in this case.

J. A. CALVIT.

Sworn to and subscribed before me, this 1 day of November, 1856.

GWINN HARRIS,
Commissioner.

Cross examined.

1. To the first cross-interrogatory on the part of the defendant, he deposes and says:

I am about forty-seven years old; I am a planter, and reside in the parish of Rapides, Louisiana; I am in no way connected with any of the parties to this suit; nor am I interested therein.

2. To the second cross-interrogatory on the part of the defendant, he deposes and says:

I have testified from my own knowledge in all the matters herein given in evidence, except in my answer to the second interrogatory in chief, and in my answer in relation to the periods of birth of myself and my brothers and sister; about these latter, I obtained information from my father and others.

3. To the third cross-interrogatory on the part of the defendant, he deposes and says:

This question is sufficiently answered by my *preceeding* answers, except as to my knowledge concerning the heirs of Mulhollan, which is derived from my acquaintance with Charles H. Flower and Mr. Salk, my transactions with the representatives of Mulholland, and hearsay; I have also seen the late Mrs. Alice Salk.

J. A. CALVIT.

Sworn to and subscribed before me, this 1 day of Nov., 1856.

GUIN HARRIS,
Commissioner.

Octavus Nash Ogden, of the parish of Rapides, and State of Louisiana, aged thirty-nine years, being produced, sworn, and examined on behalf of the plaintiffs, deposes and says:

1. To the first interrogatory on the part of the plaintiff, he deposes and says:

I knew Charles Mulholland, of Rapides, Louisiana; he is dead; he died in the summer of 1846.

2. To the second interrogatory on the part of the plaintiff, he deposes and says:

The next of kin of Charles Mulholland is Mrs. Sarah Flower, the sister of Charles Mulholland, and her children, Charles H. Flower and Alice Flower, subsequently Mrs. Salk, and now deceased, leaving one child, Charles Flower Salk. Charles Mulhollan left a will, which is annexed to the answer of James A. Calvit, marked "A;" it is referred to as a part of this answer.

3. To the third interrogatory on the part of the plaintiff, he deposes and says:

I know nothing personally of the matters enquired of in this interrogatory; knew William J. Calvit, and knows James A. Calvit and Coleman M. Calvit; also knew slightly Anthony Calvit, their father, who is dead; have no other knowledge of the family except what I acquired from my connexion as counsel in the case of Calvit's heirs *vs.* Mulholland.

4. To the fourth interrogatory on the part of the plaintiff, he deposes and says:

I know that the acting executor of Mulholland, Thomas O. Moore, paid to James A. and Coleman M. Calvit, twelve hundred dollars each for their relinquishment of their claims to the tract of land sold by Keller and Foreman to Charles Mulholland, and of all their rights in the judgment rendered in their favor in the supreme court. This payment by the executor was made the 14 November, 1846; and I considered it to have been made in good faith and in full of the claims of the two Calvits, and that it was the best arrangement that could have been made for the estate of Mulholland.

5. To the fifth interrogatory on the part of the plaintiff, he deposes and says:

On the 29 May, 1843, a judgment was rendered in the district court of Rapides, in the case of Calvits *vs.* Mulholland, in favor of the defendant. The plaintiffs' appealed. The supreme court reversed the judgment of the court below, so far as it rejected the claims of James A. Calvit and Coleman M. Calvit, and gave them a judgment for one-eighth part each of the land sued for, (which was that sold by Keller and Foreman to C. Mulholland,) sustaining the defendant's plea of prescription as to William and Eliza Calvit, and remanded the case as to questions of improvement, and rents and profits, and of damages between the warrantors. Afterwards, on an application for a rehearing, the supreme court altered their decree so far as to remand the case for the further purpose of ascertaining whether the price received by the father and tutor of James A. & C. M. Calvit, for the property in dispute, was applied to the payment of the community debts, which they would be bound to contribute in proportion to their rights in the land. But after due diligence used and earnest efforts made, no proof could be obtained by Mulholland, his executors and attorneys, that the money received by Anthony Calvit was applied to the payment of community debts of himself and his wife. The rights of James A. and Coleman Calvit were purchased, as before stated, for the sum of twenty-four hundred dollars. Afterwards, on the 3d May, 1853, a final judgment was rendered by the district court to which the case had been remanded, and in conformity with the decree and mandate of the supreme court.

O. N. OGDEN.

Sworn to and subscribed before me, this 1 Nov., 1856.

GWINN HARRIS,
Commissioner.

Cross-examined.

1. To the first cross-interrogatory on the part of the defendant, he deposes and says:

I am thirty-nine years old; am now a judge of the 13th judicial district of the State of Louisiana, and reside in the parish of Rapides, Louisiana. I am not related to any of the parties; the wife of Charles H. Flower is the half sister of my wife; and I have no interest whatever in this suit.

2. To the second cross-interrogatory on the part of the defendant, he deposes and says:

All that I have stated is of my own personal knowledge.

3. To the third cross-interrogatory on the part of the *defenant*, he deposes and says:

I was of counsel in the case of Calvit's heirs *vs.* Mulhollan, and was personally cognizant of what took place in that case, and have besides recently referred to the record of said case.

O. N. OGDEN.

Sworn to and subscribed before me, this 1 Nov., 1856.

GWINN HARRIS,
Commissioner.

STATE OF LOUISIANA,
Parish of Rapides.

Be it remembered, that on this, the first day of November, A. D. 1856, pursuant to the annexed commission, I, Gwinn Harris, the commissioner named therein, caused to come before me at my office in the town of Alexandria, Louisiana, James A. Calvit and Octavus N. Ogden, residents of the parish and State aforesaid, who, having been by me first duly sworn according to law, answered the interrogatories and cross-interrogatories hereto annexed, in the manner and form as hereinabove set forth. Which said answers were by me the said commissioner reduced to writing, and by the said deponents, respectively, sworn to and subscribed in my presence.

In faith whereof, I have hereunto signed my name on this, the first day of November, A. D. eighteen hundred and fifty-six.

GWINN HARRIS, [SEAL.]
Commissioner.

"Ne varietur."

M. R. ARIAIL,
D'y Clerk.

In the name of God, amen.

Be it known, that I, Charles Mulhollan, residing in the parish of Rapides, and State of Louisiana, do make and ordain this my last will and testament, written, dated, and signed all in my own hand writing, being my *atographic* will, *revoken* all others of whatever kind or date.

First. I give and bequeath to Jane, my housekeeper, the sum of five thousand dollars.

Second. I give and bequeath to Mary Virginia, eldest daughter of Jane, the sum of ten thousand dollars.

Third. I give and bequeath to Jane Adelaide, second daughter of Jane, the sum of ten thousand dollars.

Fourth. I give and bequeath to Charlotte Gigon, of Philadelphia, the sum of five thousand dollars.

Fifth. I give and bequeath to my nephew, Charles H. Flower, and to my neice, Alice C. Flower, all my estate, real and personal, to be equally divided between them.

"Ne varietur."
M. R. ARIAIL,
D'y Clerk.

Sixth. I will and desire that my plantation business be carried on for the term of five years after my death.

Seventh. I will and desire that all my just debts be paid.

Eighth. I do hereby appoint Thomas O. Moore, esqr., and Thomas Neale, esq., both of the parish of Rapides, executors of this my last will and testament, granting them, immediately on my death, full and entire seisen and possession of all my estate, to hold and manage the same until all the legacies herein mentioned are paid over and fully discharged.

Ne varietur.
M. R. ARIAL,
D'y Clerk.

CH. MULHOLLAN.

"Ne varietur."

M. R. ARIAIL,
D'y Clerk.

THE STATE OF LOUISIANA,
Parish of Rapides.

Be it remembered, that on this eleventh day of July, one thousand eight hundred and forty-six, personally appeared Thomas O. Moore, of the parish of Rapides, and State of Louisiana, and presented the annexed will of Charles Mulhollan, in order to be opened, proved, and recorded. Whereupon, I, M. R. Ariail, clerk of the district court in and for the parish of Rapides, and State of Louisiana, caused Hugh Lynch and John Compton, who reside in said parish and State, to prove said will. And the said Hugh Lynch being first sworn, deposes and says that he is well acquainted with the hand writing of Charles Mulhollan, deceased, late of the parish of Rapides; and that he has carefully examined the instrument presented to him, and which is hereunto annexed; and that they are written, dated, and signed entirely in the hand writing of the said Charles Mulhollan, he having often seen him write and sign his name. He further deposes and says that the said Charles Mulhollan is dead.

HUGH LYNCH.

Sworn to and subscribed before me this 11 day of July, 1846.

M. R. ARIAIL,
D'y Clerk.

And the said John Compton, being duly sworn, says that Charles Mulhollan is dead; that he is well acquainted with the handwriting of the said Charles Mulhollan; that he has carefully examined the instruments to him, and which are hereunto annexed, and that they are written, signed, and dated entirely in the handwriting of the said Charles Mulhollan, he having often seen him write and sign his name.

J. COMPTON.

Sworn and subscribed before me, this 11 day of July, A. D. 1846.

M. R. ARIAIL, *Dy. Clk.*

And the death of the testator, Charles Mulhollan, being duly proved, and the said will hereunto annexed, which is of the olographic clau, having been opened and proved by the depositions of the said Hugh Lynch and John Compton to be written, dated, and signed in the proper handwriting of the said Charles Mulhollan, deceased, I, the said deputy clerk of the district court, proceeded to read the said will in an audible and distinct voice to the witnesses and other persons present, and have paraphed "ne varietur" the beginning and end of the pages on which it is written.

It is therefore ordered that the said will be deposited in the office of the clerk of the district court of the parish of Rapides, that it be recorded, and that the provisions of the same be executed.

In faith whereof, I hereunto sign my name, this eleventh day of July, A. D. 1846.

M. R. ARIAIL,
Dy. Clerk.

Filed July 11, 1846.

M. R. ARIAIL,
Dy. Clk.

CLERK'S OFFICE, DISTRICT COURT,
Parish of Rapides, State of Louisiana.

Parish of Rapides, State of Louisiana, thirteenth judicial district.

I, C. E. Jewitt, clerk of the district court of the thirteenth judicial district in and for the parish of Rapides, and State of Louisiana, do hereby certify that the foregoing pages contain a full, true, and complete transcript of the will of Charles Mulhollan, and of the testimony adduced and proceedings had in the probate thereof.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at my office in the town of Alexandria, parish and State aforesaid, this first day of November, A. D. 1856.

C. E. JEWITT, *Clk.*

STATE OF LOUISIANA,
Parish of Rapides, to wit:

I, O. N. Ogden, presiding and sole judge of the district court of the 13 judicial district of the State of Louisiana in and for the parish of Rapides, do hereby certify that Charles E. Jewitt, whose name is subscribed to the foregoing certificate, is now,

and was at the date of said certificate, clerk of the court aforesaid, and that his said attestation is in due form.

O. N. OGDEN,
Dist. Judge 13 *Judicial District of Louisiana.*

Clerk's Office, District Court, parish of Rapides, State of Louisiana.

I certify that Octavus N. Ogden, whose genuine signature appears to the above certificate, and which is entirely written in his own proper handwriting, was at the date thereof sole presiding judge in and for the parish and State aforesaid, duly commissioned and sworn.

Given under my hand and the seal of said court at Alexandria, this 1 day of November, A. D. 1856.

[SEAL.] C. E. JEWITT, *Clerk.*

This is the paper marked "A," referred to by James A. Calvit and Octavus N. Ogden in their examination.

GWINN HARRIS,
Commissioner.

And thereupon, the court, at the instance of defendants' counsel, instructed the jury as follows:

Courts' Instruction.

The defendant prays the court to instruct the jury, first, that the act of the State of Maryland passed in the year 1715, chapter 23, entitled "An act for limitation of certain actions, for avoiding suits at law," and the act of said State passed in the year 1816, chapter 216, entitled "An act to avoid suits at law," constitute a bar to the recovery by the plaintiff in this case. To the granting of which instruction the plaintiff excepted, and this bill of exceptions is signed, sealed, and enrolled this 24th November, 1856.

WILLIAM F. GILES. [SEAL.]

And now here at this day, to wit, on the twenty-fourth day of November, A. D. 1856, the said Charles Flowers produced to the said circuit court the writ of the United States of America for the correction of errors of and upon the premises, commanding the record and proceedings aforesaid of the judgment aforesaid so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the first Monday in December next; which said writ of error is in the words and of the tenor following, to wit:

THE UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Judges of the Circuit Court of the United States for the four circuit in and for the Maryland district, greeting:

[SEAL.]

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court, before you or some of you, between Charles Flowers, survivor of Alice Flowers, plaintiff, and Francis Foreman, surviving partner of Christian Keller, defendant, a manifest error hath happened, to the great damage of the said Charles Flowers, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable R. B. Taney, Chief justice of our Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and fifty-five.

Issued 24 November, 1856.

THO. SPICER, *Clk. Circ. Ct.*

In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said supreme court accordingly. * * * * *

* * * * * * * * * * * *

The United States of America to Francis Foreman, surviving partner of Keller & Foreman, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fourth circuit, in and for the Maryland district, wherein Charles Flowers, survivor of Alice Flowers, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against

the said Charles Flowers in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness my hand and seal this eleventh day of February, in the year of our Lord one thousand eight hundred and fifty.

WILLIAM F. GILES. [SEAL.]

We acknowledge notice of the above citation.

BROWN & BRUNE.

Writ of error bond.

Know all men by these presents, that we, Robert Brent and Vivian Brent, are held and firmly bound unto Francis Foreman, surviving partner of Keller and Foreman, in the just and full sum of five hundred dollars, lawful money of the United States, to be paid to the said Francis Foreman, his certain attorney, executors, *executors*, administrators, or assigns, to which payment well and truly to be made and done, we hereby bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 26 day of January, in the year of our Lord one thousand eight hundred and fifty-seven.

Whereas, heretofore, to wit, on the third day of November, in the year of our Lord one thousand eight hundred and fifty-five, Charles Flowers and Alice Flowers instituted their suit against the said Francis Foreman, in the circuit court of the United States for the fourth circuit in and for the Maryland district, in an action of trespass on the case, and so forth:

And whereas, also at the circuit court of the United States for the fourth circuit and district of Maryland, begun and held at the city of Baltimore, on the first Monday in November, in the year of our Lord one thousand eight hundred and fifty-six, the said Francis Foreman recovered his judgment against the said Charles Flowers for his costs and charges by him about his defence in that behalf laid out and expended:

And whereas the said Charles Flowers hath sued out the writ of the United States of America for the correcting of errors, and a citation directed to the said Francis Foreman, citing and admonishing him to be and appear at a Supreme Court of the United States, to be held at the city of Washington, on the first Monday in December then next, to show cause, if any there be, why the judgment aforesaid, so as aforesaid rendered as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties aforesaid in this behalf:

Now, the condition of the aforegoing obligation is such, that if the said Charles Flowers shall well and truly prosecute with